UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

……..
In the Matter of:

NOVEL SERVICE GROUP, INC.,

Respondent,

Case No. 02-CA-113834

02-CA-118386

LOCAL 32BJ, SERVICE EMPLOYEES INTERNATIONAL UNION,

Charging Party.
…….

RESPONDENT'S EXCEPTIONS TO AND SUPPORT OF PORTIONS OF THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Please take notice that pursuant to §102.46 of the National Labor Relations Board Rules and Regulations, Novel Service Group ("NSG" or "respondent"), by its attorneys, Ganfer & Shore, LLP, submits the following exceptions to and support of the decision of Administrative Law Judge Raymond Green ("ALJ" or "Judge Green") in the above-referenced matter:

1. The ALJ, we submit, correctly determined that NSG although a successor employer, unilaterally, albeit lawfully, established initial wages, terms and conditions of employment. Moreover, as a matter of law and policy he properly rejected the invitation by counsel for the general counsel ("CGC") and the union ("Local 32BJ" or "union") to overrule the National Labor Relations Board's ("Board" or "NLRB") long standing *Spruce Up Corp.* precedent.[1]

1. 209 NLRB 194 (1974).

Judge Green found (at Decision, P. 3, L. 14)[2] that "[o]n August 27, the Respondent tendered a letter to each of the cleaning employees and requested that they sign it. This letter was in the form of a job offer and set forth the initial terms and conditions of employment." It read:

> This letter has been prepared to detail our offer of employment at 295 Madison Avenue to you. Please take a few moments to read these items.
>
> You understand and agree that your employment with Novel Service Group, Inc. will be on at-will basis, and that neither you nor Novel Service Group, Inc. has entered into a contract regarding the terms or the duration of your employment.
>
> Information relevant to the job:
>
> Job Classification: Custodian
>
> Start Date: August 30, 2013
>
> Term of Employment: We are offering employment for a term of 90 days. After the 90-day period expires, if you wish to continue working for us you must reapply for employment and we do not intend to hire everyone who has reapplied.
>
> Prior Wages & Terms: Any wages or other terms and conditions of your employment by QBS are hereby revoked and no longer in force.
>
> Your employment: At will; you are subject to termination with or without cause.
>
> Hours: Full-time: 8 hours per day; shift times to be set.
>
> Status: Hourly position; non-exempt status.
>
> Wages: $12.00 per hour up to 40 hours in a work week; $18.00 per hour for any hours worked in excess of 40 in a work week.
>
> Payroll: Twenty six (26) pay periods (bi-weekly) per year.
>
> Benefits: None at present.

2. References are to the pages and lines of the ALJ's decision. ("Decision, P. ___, L. ____").

"There is no dispute," the ALJ noted, "about the fact that before setting the initial terms of employment, the Respondent did not notify or offer to bargain with the Union." (Dec-ision, P. 3, L. 50). The CGC and the union contend that NSG violated the National Labor Relations Act ("Act") by doing so, and urged Judge Green to overrule *Spruce Up Corp.*

Judge Green summarized their position (at Decision, P. 15, L. 11) as follows:

> The General Counsel and the Union argue that the Respondent, because it intended to hire substantially all of the predecessor's employees, was a "perfectly clear" successor as that term is used in NLRB v. Burns Security Services, 406 U.S. 272, (1972). They argue that the Board should overrule Spruce Up Corp., 209 NLRB 194 (1974), where the Board opined that the Burns "perfectly clear" caveat should… [b]e restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours or conditions of employment, or at least to circumstances where the new employer … has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. Thus, they argue that if the Respondent in this case is a "perfectly clear" successor, then it should be required to bargain with the Union before establishing wages, hours and conditions of employment even if the successor clearly announced its intent to establish a new set of conditions before offering employment to the predecessor's employees.

Judge Green declined to do so, however, stating, "I obviously cannot overrule existing Board precedent and shall not do so here." (Decision, P. 15, L. 29) He consequently applied *Spruce Up Corp.*, letting stand NSG's new wages, terms and conditions of employment, and ordering no remedy with respect thereto.

It is axiomatic that a successor employer is not bound by the substantive provisions of its predecessor's collective bargaining agreement, and is free to set initial terms of employment for its new employees. *See, NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 294-95 (1972). There is a significant exception to the general rule, as the CGC and the union pointed out – if it is "perfectly clear" that the successor employer plans to retain all of the employees in the bargaining unit, the employer must consult with the employees' bargaining representative before it

employees' bargaining representative before it fixes the initial terms of employment for its new employees. *See, e.g., Canteen Corp. v. NLRB*, 103 F.3d 1355, 1361 (7th Cir. 1977) (employer's fixing of initial terms of employment for potential hires affirmed, citing *Spruce Up Corp.*).[3]

This corollary principle, first enunciated by the Court in *Burns*, has historically been referred to as the "perfectly clear" exception. *See, Canteen Corp.*, 103 F.3d at 1361. The *Burns* court, offered little guidance, however, as to the scope of the "perfectly clear" exception, thereby creating a void that encouraged the Board in 1974 to step in to define the "perfectly clear" exception in *Spruce Up Corp*.

Seizing the opportunity, the Board held that a successor employer is *not* a "perfectly clear" successor where, *as the undisputed record reflects GNS has done here,* it announces new terms of employment prior to or simultaneously with an invitation to the predecessor's former employees to accept employment with it. *Spruce Up Corp.*, 209 N.L.R.B. at 195.

We think it useful at this point briefly to sketch the operative facts in *Spruce Up Corp*. Spruce Up was a concessionaire operating a number of barbershops at Fort Bragg, North Carolina. *Spruce Up Corp.*, 209 N.L.R.B. at 194. A union was certified as the representative of Spruce Up's barbers shortly before Spruce Up was outbid by Cicero Fowler ("Fowler"), another concessionaire, to operate Fort Bragg's barbershops. *Id.* When the union learned that Fowler was the lowest bidder, and therefore likely to take over the barbershops, it contacted him and requested that he recognize and bargain with it. 209 N.L.R.B. at 194

3. In *Canteen Corp.,* 317 N.L.R.B. 1052 (1995), the Board held that a purchaser can set its own initial terms and conditions of employment if such terms are presented to potential hires in the first communications the purchaser has with them.

Fowler rejected the union's request, contending first, that he had no employees at the time, and second, that he had no duty to bargain with the union until he actually took over the barbershops sometime down the road. *Id*. Fowler also informed the union that he intended to hire all working barbers, albeit at different commission rates than the rates they had been paid by the previous concessionaire. *Id.* at 195

Three weeks later, just prior to his scheduled takeover of the post's barbershops, Fowler distributed individual form letters to the barbers at all of Fort Bragg's barbershops informing them of the commission rates that he intended to pay – which, as the NSG's wages in this case, differed from the barbers' current rates with Spruce Up -- if they came to work for him.

The NLRB stated that Fowler's actions did *not* fall within the parameters of the "perfectly clear" exception [*id.*], since, as the Board noted, although Fowler – as respondent did here -- had expressed his general willingness to hire the barbers formerly employed by Spruce Up *"at the same time [he indicated that] he was going to change the commission rates." Id.* (Emphasis added)

Applying *Spruce Up Corp.* to *Burns'* "perfectly clear" exception, the Board determined that Fowler made it perfectly clear to the employees from the outset that he intended to set his own initial terms, and that whether or not he would retain the incumbent barbers would depend on their willingness to accept those terms. *Id.*

It is fair to say that over the past 41 years the Board has without deviation interpreted the *Burns* "perfectly clear" exception as follows:

> When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous workforce to accept employment under those terms, we do not think it can fairly be said that the new employer "plans to retain all of the

> employees in the unit," as that phrase was intended by the Supreme Court. *Id.* at 195.[4]

We acknowledge that the Board has recognized that there are limits to the *Burns* "perfectly clear" exception – *not a single one of which can be found in NSG's conduct or, indeed, anywhere in the record.* It "should be restricted," the Board ruled:

> to circumstances in which the new employer has either actively, or by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer … has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. *Id.* (Internal citations omitted); *see also Grenada Stamping & Assembly, Inc.*, 351 NLRB 1152 (2007); *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 10 (2006).[5]

The Board concluded in *Spruce Up Corp.* that Fowler's expressions "did not operate to forfeit his right to set initial terms," and found, therefore, that he did not violate the Act in doing so. *Id.* at 195.

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4. *Compare Windsor Convalescent Center of North Long Beach*. 351 NLRB 975 (2007) (successor sent letter to predecessor's employees offering them temporary employment and that they were not eligible for certain benefits, but added that "[o]ther terms and conditions of your employment will be set forth in Windsor's personnel policy and its employee handbook;" held: a general statement that new terms will be set is insufficient to fulfill *Spruce Up Corp.'s* obligation to announce new terms prior to or simultaneous with the takeover); *see also, DuPont Dow Elastomers, LLC*, 332 NLRB 1071 (2000), *enfd.* 296 F.3d 495 (6th Cir. 2002) (employer announced it would hire all of the predecessor's employees on the same terms, and only announced changes after it began hiring); *Bellingham Frozen Foods, Inc. v.* NLRB, 626 F.2d 674 (9th Cir. 1980), *Elf Atochem North America*. 339 NLRB 796, 808 (2003).

5. *See, Nexeo Solutions,* LLC, Cases 13-CA-46694, 13-CA-62072, 20-CA-35519, JD (SF)-42-12, 2012 NLRB LEXIS 543, 2012 WL 3776858 (2012). The Board reaffirmed this approach in *Fremont Ford,* 289 NLRB 1290 (1988), stating that "since Spruce Up the Board has adhered to this distinction based on when the successor employer announces its offer of different terms of employment in relation to its expression of intent to retain the predecessor's employees unless the successor has misled them." *See also, Level, a Division of Worcester Mfg.,* 306 NLRB 218 (1992).

Over the past 41 years the clarity and simplicity of the Board's *Spruce Up Corp.* interpretation of the *Burns* "perfectly clear" exception has served the both businesses and labor organizations exceedingly well, and, without prejudicing employees' §7 rights, provided clear and unwavering guidance for determining whether or not – and under what circumstances – a successor employer may unilaterally establish its initial terms of employment.

The Second Circuit's decision in *Nazareth Regional High School v. NLRB*, 549 F.2d 873 (2d Cir. 1977), which in relevant part addressed a successor employer's duty to bargain over the initial terms and conditions of employment – a primary question in this case – is particularly useful.

In *Nazareth* the Board found that it was "perfectly clear" that Nazareth Regional High School, which had been formed by the merger of some other schools, intended to retain all of the previous schools' lay faculty because prior to the merger of the existing schools it had told the union representing the lay faculty at those schools "not to worry," as all of them would be retained, and, accordingly, that the successor school had violated the Act by unilaterally establishing its own initial terms and conditions of employment.

The court observed, however, that while Nazareth Regional High School indicated at an early date an intention to retain the whole staff, it never committed itself to offering them the ,same terms of employment. On the contrary, Nazareth mailed letters to most of the lay faculty early in April inquiring whether they wished to teach at Nazareth, and informing them that such employment would be on new terms.

The Second Circuit set aside the Board's order *on this point*, noting that while "[t]he NLRB [had] found independent violations of §§8(a)(1) and (5) solely on the basis of that

statement," the Board's finding that the employer did not have the right to set the employees' initial terms and conditions of employment, had to be "set aside."[6]

The court stated that in *Spruce Up Corp.,* "the NLRB had ruled that when the successor employer promised to retain all of the predecessor's employees and then mailed letters to the employees offering different terms of employment, it was *not* perfectly clear that the successor intended to retain all of the employees because the offers indicated that only those accepting the new terms would be given employment" (internal citation omitted) (emphasis in original), and pointed out that the Board had "rejected the contrary conclusion as undesirable:"

> For an employer desirous of availing himself of the *Burns* right to set initial terms of employment would, under any contrary interpretation, have to refrain from commenting favorably at all upon employment prospects of old employees for fear he would thereby forfeit his right to unilaterally set initial terms, *a right to which the Supreme Court attached great importance in Burns. Spruce Up, 209 N.L.R.B. at 195* (Emphasis added)

We submit that the few cases over the past 41 years that may appear on cursory analysis to reflect the NLRB's rare departure from *Spruce Up Corp.* are inapt. A brief review of recent cases demonstrates that the Board has not in more than four decades compromised its *Spruce Up Corp*. ruling.

In *Advanced Stretchforming International, Inc.*, 323 N.L.R.B. 529 (1997), the Board addressed "the only issued raised by the [charging party's] exceptions'" namely, whether the successor employer, obligated to recognize the union's "continuing status as a collective-bargaining representative, had the legal right to establish unilaterally its initial terms and conditions

6. The court noted that while its conclusion did not affect the Board's bargaining order, it did mandate a denial of enforcement of that portion of the NLRB's order which compelled "Nazareth to make restitution for any wages and benefits that may have been lost as a result of its unilateral imposition of terms and conditions of employment."

of employment for bargaining unit employees." The ALJ had determined that it did; the Board disagreed, and found that "the Respondent violated Section 8(a)(5) and (1) by unilaterally changing its employees' wages and other terms and conditions of employment at the time of hire."

The issue in *Advanced Stretchforming*, however, was not whether the ALJ, in concluding that the employer, simply by mentioning that the predecessor's employees would lose their seniority, "clearly manifested its intention to establish its own initial terms of employment," but whether the successor employer's contemporaneously informing the employees that there would be no union, a clear §8(a)(1) violation.[7]

The Board's *Advanced Stretchforming* decision, which, significantly, neither criticized the ALJ's nor the Board's *Spruce Up Corp.,* interpretation of the *Burns* "perfectly clear" *caveat* itself, instead held that *Spruce Up Corp.*, owing to the employer's own unlawful conduct, namely informing the employees that there would be no union – which is not alleged in this case – was not determinative of the legality of the employer's conduct in setting the initial terms and conditions of employment. As the Board stated,

> [i]nstead, we rely on another well-established exception to the right of a *Burns* successor to set initial terms and conditions of employment. In *U.S. Marine Corp.*, 293 N.L.R.B. 609, 672 (1989), for example, the Board held that
>
> > An employer – like Respondents – that unlawfully discriminates in its hiring in order to evade its obligations as a successor does not have the *Burns* right to set initial terms of employment without first consulting with the Union. The Respondents forfeited any right they may have had as a successor to impose initial terms when they

7. This statement, the Board held, "was a clearly unlawful message to employees that the Respondent would not permit them to be represented by a union." *Love's Barbeque Restaurant*, 245 NLRB 78, 129 (1979), *enfd. in pertinent part* 406 F.2d 1094 (9th Cir. 1981).

> embarked on their deliberate scheme to avoid bargaining with the Union by their discriminatory hiring practices.

In sum, then, Judge Green assuredly "got it right" when he declined to overrule the Board's *Spruce Up Corp.* decision. We respectfully submit that the Board adhere to the old adage, "if it ain't broke, don't fix it," and in the absence of overwhelming empirical evidence that *Spruce Up Corp.* has either proved virtually impossible to apply, is unworkable or substantially undermines the central protections of the Act – and it is clear that no such evidence exists – on this record, neither reconsider nor overrule *Spruce Up Corp.* There simply is no compelling reason to do so.

2. On the issue of when, exactly, NSG became a successor, whether in August 2013, when it commenced its operations in the building having, as it was concededly required by law to do, the majority of its initial staff having been employed by the former building cleaner, or at the end of November 2013, after New York City's 90-day mandatory retention period ended, [8] Judge Green observed (at Decision, P. 14, L. 6) that

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8. The ALJ is referring to Section 22-505(b)(6)-(7) of the of the Administrative Code of the City of New York, the Displaced Building Service Workers Protection Act ("DBSWPA"), which imposed upon NSG a mandatory requirement that NSG employ the former cleaner's employees for at least 90 days; providing, in relevant part, that:

> [a] successor employer shall retain for a ninety (90) day transition employment period at the affected building[] those building service employee[] of the terminated building service contractor…employed at the building[] covered by the terminated building service contract The DBSWPA defines a "successor employer" as "a covered employer that (i) has been awarded a building service contract to provide, in whole or in part, building services that are substantially similar to those provided under a service contract that has recently been terminated, or (ii) has purchased or acquired control of a property in which building service employees wereemployed." New York City Administrative Code §22-505(a)(8).

> The local law gives an employer 90 days within which to decide whether or not to offer permanent jobs to the predecessor's employees. It also gives an employer sufficient time to recruit, hire and train other employees if it chooses not to retain some or all of the predecessor's employees. It therefore is my opinion that 90 days constitutes a reasonable amount of time for an employer to make a choice and to implement whatever choice it makes. Therefore, in the context of this case and in this industry, (which does not required a skilled work force), I think that employment status should be determined as of the date that the employer makes an accepted offer of employment or … [if] not formally made by the 90th day, then on the 91st day after that employee has performed services for the employer. That is, if the employer has not chosen to get rid of an employee previously employed by his predecessor, then the employer should be deemed to have voluntarily hired that employee.
>
> Since the record in this case shows that as of November 27, 2013, a majority of the Respondent's work force consisted of the predecessor's employees, I conclude that it is a successor having an obligation to recognize and bargain with the Union.

If Judge Green's conclusion is that NSG became a successor on November 27, 2013 rather than on August 29, 2013, respondent does not take exception. However, when he continues, stating (at Decision, P. 14, L. 20) that "*I therefore do not think that it makes any difference whether the successor bargaining obligation arose on August 29, 2013 when it commenced work at the building or on November 27, 2013, after the 90 day period expired,"* we believe he erred and we do take exception. (Emphasis added)

Contrary to the ALJ's statement, it *does* make a difference, and despite Judge Green's apparently off-handed remark that it does not, Judge Green, himself, Judge Cogan, in *Paulsen v. GVS Properties, LLC,* and the General Counsel's argument in *M & M Parkside Towers, LLC,* have uniformly recognized that the DBSWPA – and nothing else -- compelled NSG to retain its predecessor's employees for 90 days and for that statutorily-mandated period deprived NSG of the

ability *voluntarily* to choose to take advantage of its predecessor's workforce and hire a majority of its employees from its predecessor, a prerequisite for *Burns* successorship to attach.[9]

Accordingly, we submit that it was improper for the ALJ to attach no significance to the date on which he determined that NSG became a *Burns* successor (whether at the start of the DBSWPA's 90-day employee retention period or at its conclusion, when permanent job offers matured). Hence, despite the ALJ's diffidence, he actually (and inconsistently) recognized as much (at Decision, P. 13, L. 13) when he stated:

> In my earlier opinion in M & M Parkside Towers, LLC, JD-05-07, I concluded that although the employees who were hired from a predecessor had no guaranteed expectation that they would be offered permanent position and because they had not yet been offered permanent jobs, *their status was indeterminate at the outset and one could not, at that the commencement of operations, determine if a majority of the Respondent's work force was going to be composed of the predecessor's employees. I also concluded that these workers were subsequently offered permanent jobs and that when their employment status was resolved, it was shown that a majority of the successor's work force was comprised of the predecessor's employees. According[ly], I found that the Respondent was a Burns successor and therefore had an obligation to recognize and bargain with the Union.* (Emphasis added)

In the New York City building cleaning service industry, the ALJ stated in *M & M Parkside Towers, LLC,* "the predecessor's employees become permanent employees of a new employer, this should be determined as of the time actual offers of employment are made, or if

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9. As Judge Green observed (at (Decision, P. 13, L. 24) his view is consistent with Judge Cogan's opinion in *Paulsen v. GVS Properties, LLC*, where at footnote 5 he stated:

> If, however, at the end of the 90 day period, a new employer become[s] a Burns successor by voluntarily hiring a majority of its employee from its predecessor's work force, it would be required to recognize and bargain with the union before established the terms and conditions of continued employment.

not formally made before the 90 day period mandated by the local law, within a reasonable period of time thereafter."

"This," Judge Green stated, contradicting his observation that the date makes no difference (Decision, P. 14, L. 20), "remains my thinking on the matter…." (Decision, P. 13, L. 24)

Dated: New York City
February 26, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document, entitled RESPONDENT'S EXCEPTIONS TO AND SUPPORT OF PORTIONS OF THE ADMINISTRATIVE LAW JUDGE'S DECISION, was served on the following parties via electronic mail on February 26, 2015.

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